2834

No. [redacted]

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff in Error,

vs.

ADA T. STEWART,

Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

BRIEF FOR DEFENDANT IN ERROR

S. WARBURTON and
BOYLE, BROCKWAY & BOYLE
Attorneys for Defendant in Error.

310 Fidelity Building,
Tacoma, Washington.

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, *Plaintiff in Error,* vs. ADA T. STEWART, *Defendant in Error.*	No. 1915.

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HON. EDWARD E. CUSHMAN, *District Judge.*

BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

This action was brought on a policy of insurance in the sum of Five Thousand Dollars, by the defendant in error.

Application for the policy was made on or about the 2nd day of February, 1915.

The policy was issued on or about the 19th day of February, 1915.

The first premium was paid and the policy was delivered on April 15, 1915. The application contained the following agreement:

> "And it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full, while my health, habits and occupation are the same as described in this application."

The application also provided that the premium was to be paid on the delivery of the policy. The policy contained the following provision:

> "PREMIUM—Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company."

Following this is an alternative clause, giving the assured the privilege of paying the premiums on other dates, to a local agent, providing he had the official premium receipt, signed by the proper officials of the company.

> "GRACE IN PAYMENT OF PREMIUM.—In the payment of any premium

under this policy, except the first, a grace of one month, not less than thirty days, without interest, will be allowed during which time the policy will remain in force."

The company admits, as it admitted in the court below, that the insured was entitled to a month of grace in the payment of the second quarter-annual premium. This is admitted in a letter denying liability, in part as follows:

"You will recall that the first premium was paid on April 15, when the policy was delivered to Mr. Stewart in our Tacoma office by Mr. Dole, the Superintendent in charge. One month before the due-date of the second premium a notice of the premium due May 19th was sent to Mr. Stewart from this office, and ten days before the end of the grace period (which expired June 19, 1915,) Mr. Dole sent a notice to the insured calling special attention to the approaching end of this grace period."

The insured died on the 19th day of July, 1915.

The defendant in error insists that, under the terms of the policy, the second quarter-annual premium became due one-quarter of a year after the delivery of the policy and the payment of the premium, which was on the 15th day of April, 1915.

That the second quarterly premium became due on the 15th day of July, and the month of grace,

carried the policy until the 15th day of August, or twenty-six days beyond the death of the insured. This is the only question in the case. The facts in reference to it are undisputed, and we base our case here, as in the court below, on a correct construction of the policy and application.

THE FIRST PREMIUM WAS PAID ON THE 15TH DAY OF APRIL. THE NEXT PREMIUM WAS DUE ONE-QUARTER OF A YEAR AFTERWARDS OR ON THE 15TH DAY OF JULY. THE MONTH'S GRACE CARRIED THE POLICY UNTIL AUGUST 15TH.

As already stated, the essential facts in this case are undisputed. The policy was delivered to the insured and the first premium thereon paid on the 15th day of April, 1915. By the terms of the application and the policy, the payment of the first premium, and the delivery of the policy were to be concurrent acts, and the policy should take effect at the moment of the delivery of the policy and the payment of the premium, and not a minute prior thereto. This is the language of the application:

> "And it is further agreed, that the policy herein appliled for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health, habits

and occupation are the same as described in this application."

This language is plain and unambiguous as to the date the policy should go in force. The application also provided for quarter-annual premiums, the first to be paid on the delivery of the policy. The policy provides that the

> "PREMIUM.—Twelve and 70-100 Dollars, payable on the delivery of this policy and *thereafter quarter*-annually at the home office of the company."

No note or credit was given on the payment of the first premium, nor was any money paid until the delivery of the policy. So there can be no question as to the day on which the policy took effect, to-wit: on the 15th day of April, 1915.

The courts of last resort are unanimous in holding that, where a policy of insurance specifically provides that it shall not take effect or be in force until the policy is delivered and the premium paid, it becomes operative on the day these two things occur, and not prior thereto. No case can be found, announcing a contrary doctrine. The defendant company is not in a position to make any other claim. The language above quoted is the language of the company. It uses this plain and unambiguous language, clearly, to protect itself in case of the death of the insured or of his becoming in poor health, prior to the delivery of the policy and the

payment of the premium. It has constantly urged and insisted on this interpretation, whenever it has been to its interest so to do.

In a very recent case, this plaintiff in error successfully urged this point of law before the Supreme Court of Michigan, in the case of Bowen vs. Prudential Insurance Co., 144 N. W., 543; the insured had paid the premium concurrent with the signing of the application, and this is successfully maintained in the Supreme Court of that state, on the doctrine we are now contending for. So also in Giddens vs. Insurance Co., 26 Law Ed. 92.

The company, by its literature, table of rates, by its agents and by the policy itself, led the insured to believe that $12.70 would carry the policy for one full quarter of a year. That the insured would be fully protected for one-quarter of a year after the date the policy was delivered, and the first premium paid, together with one month of grace, as provided by the policy. Nothing could be clearer. Neither party can say that they understood the matter in any other way. The policy says:

> "PREMIUM.—Twelve and 70-100 Dollars, payable on the delivery of this policy and *thereafter* quarter-annually at the home office of the company."

Now, $12.70, the first premium under this agreement, would pay for and carry the policy for as long as the second quarterly premium, or the third quarterly premium, or any other quarterly

payment. Could any language be plainer or less ambiguous? Is there any room for any other construction than that the first premium was to be paid on the delivery of the policy and the next to be paid *thereafter* quarter-annually? What does the word "thereafter" mean, unless it means that the second quarter-annual premium should be paid a quarter of year after the delivery of the policy? The first was to pay for a quarter of a year, beginning with the policy going into force and effect, and it would carry it for one-quarter of a year, plus the one month of grace provided for. If the second premium was to be paid "quarter-annually" after the date of the delivery of the policy and the payment of the first premium, then it would carry it for one-quarter of a year beyond April 15th, or to July 15th, and the month of grace would carry it in full force and effect until August 15th. The word "thereafter" used in this connection is entirely meaningless, unless given this construction. This meaning and this construction is in exact accordance with what the company led the insured to believe the policy would provide, and exactly what the premium would do—that such a premium would carry the policy for a full quarter of a year.

If the policy were to provide for the payment of a second premium prior to the quarterly date thereafter, or less than three months thereafter, then the company would have been attempting to perpetrate a clear fraud on the insured. It would have been attempting to defraud him out of insur-

ance that he was actually paying for. There can be no doubt that the insured would expect three months' insurance, when he paid just exactly the amount that company was asking for, carrying his life risk for five thousand dollars for three full months.

So here we have a clause that is clear and unambiguous as to the date, the second and other premiums would be due and payable, and it is also in exact accordance with what the insurance company had induced the insured to believe it would do, just exactly what its table of rates said it would do in case it accepted the risk of the insured, and just exactly what the insured understood he was paying his good money for. It is perfectly absurd for the company to claim that it represented to the insured that his first quarter-annual premium would carry the policy for one-twelfth of a year, or just one month and three days. It is equally absurd to suggest that the insured paid his full quarter-annual premium and clearly understood that he was getting only one month and three days' insurance.

All we ask of this court is, to enforce this provision just exactly as it reads. In doing so, it will be doing exactly what is just to the company which wrote the words of the contract. It will be enforcing the contract for just one-quarter of a year and for the full price that the company itself named, and it will be giving to the insured just exactly what he paid his money for, and exactly at the price the company volunteered to do it for. A court never

finds it difficult to enforce a contract, where it can do exact justice to both parties under the terms of a contract which both parties entered into. I would be quite willing to leave this point, without citing an authority in support of our contention. To us it is too clear to need authorities to support it. I have found no decided case where the language of the policy is identical with this, possibly for the reason that no company heretofore has had the temerity to insist on misconstruing its own plain language to secure a forfeiture.

No case that we have found can be said to decide the exact point of this case, for the simple reason, we have found no case where the provisions relative to the date premiums are due, and payable, are similar or anywhere near similar, to the provisions of this policy in reference thereto. In fact, all that we need in this case is a simple reading of the provision and the enforcement of it, as it clearly reads.

But there are a number of cases where a like principle is involved and where the courts sustain our contention. If we apply the reasoning of the court in the case of McMaster vs. Insurance Company, 46 Law Ed. 39, 183 U. S. 72, our contention is fully sustained. We quote from the opinion:

> "McMaster was justified in assuming, and on the findings must be held to have assumed, that if he paid the first annual premium in full he would be entitled to one year's protection, and to one month of grace

in addition, that is, to thirteen months' immunity from forfeiture. And the findings show that the company, by its agent, gave that meaning to the clause, and that McMaster was induced to apply for the insurance by reason of the protection he supposed would be thus obtained."

"When, then, McMaster signed these applications he understood, and the company by its agent understood, that if the risks were accepted at the home office he would, by paying one year's premium in full, obtain contracts of insurance which could not be forfeited until after the expiration of thirteen months."

"On the other hand, can the company deny that McMaster obtained insurance which was not forfeitable for non-payment of premiums within thirteen months after the first payment

If it can, by reason of its own act, without McMaster's knowledge, actual or legally imputable, then the company's conduct would have worked a fraud on McMaster in disappointing, without fault on his part, the object for which his money was paid."

"We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if pos-

sible, which will sustain, rather than forfeit, the contract. Thompson v. Phenix Ins. Co., 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; First Nat. Bank v. Hartford F. Ins. Co., 95 U. S. 673, 24 L. ed. 563.

"Each of these policies recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an annual premium of $21, 'and of the payment of a like sum on the 12th day of December in every year thereafter during the continuance of this policy."

"Does this latter provision require payment of an annual premium during the year already secured from forfeiture by payment made in advance?

"May not the words 'in every year thereafter' mean in every year after the year the premiums for which have been paid? Or in every year after the current year from the date of the policy?

"At all events, if the payment in advance was a payment which put in force a contract good for life, determinable by non-payment of subsequent premiums, and this first payment was payment of the premiums for a year, could the requirement of payment of a second annual premium within that year be given greater effect than the right to cancel the policies from January 18, 1895, if such

payment were not tendered until after the lapse of thirteen months from December 12, 1893?"

"To hold the insurance forfeitable for non-payment of another premium within the year for which payment had already been fully made would be to contradict the legal effect under the applications and policies of the first annual payment."

"In our opinion the payment of the first year's premiums made the policies non-forfeitable for the period of thirteen months, and, inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action."

To the same effect is the case of Stramback vs. Fidelity Mut. Life Ins. Co., 102 N. W. 731, decided by the Supreme Court of the State of Minnesota, which approves the doctrine laid down in the McMaster case, and uses the following language:

"The rule of construction to be applied here is that the instrument shall be construed strictly against the insurer. It would have been a very easy matter to insert a clause to the effect that the policy should take effect from its date, if such was the intention of the insurer, and, in the absence of any such provision or agreement on the part of the insured, the following provision should control: 'The application, a copy of which is

given on the third page, forms the sole basis of this contract, which is not to be operative or binding until the actual payment of the initial premium and delivery of the policy during the lifetime and good health of the insured.' This language, taken by itself, means not only that the contract became effective upon the date of payment and delivery of the policy, but also that the policy commenced to run from such date. Respondent refers to the following clause in the policy in support of its theory that it was contemplated by the parties that the period of insurance paid for was to begin September 8th, and not at the time of payment and delivery: 'This contract is made in consideration of the written application—and the payment in advance to said company of $55.02 on the delivery of this policy, and thereafter to the company at its head office in the city of Philadelphia upon the 8th day of the months of September and March in every year until the premiums for fifteen full years shall have been duly paid to said company.' It may be admitted that if this clause were the only provision relative to the subject it might be susceptible of such meaning, but this language must be read in connection with other provisions, viz., the following: 'The premiums hereon may be paid annually, semi-annually or quarterly, in advance, in accord-

ance with the company's table of rates applicable hereto, but in any event this policy shall continue in force only for the period actually paid.' In our judgment, the significant thing is the payment of the premium in advance, and not the date of its payment; and the insured, when furnished with the policy, was entitled to assume that by the payment of the semi-annual premium he had paid for half a year's insurance, and he was advised that all subsequent premiums were required to be paid on the 8th of March and September, but what was there to call his attention to the fact that the period of insurance was to date from the day of such payments? If such is the custom and practice of insurance companies, and the insured had knowledge of it, the record is silent upon that point. The argument is advanced that it would tend to much confusion if insurance policies were required to run from the date of their delivery, instead of the date of their issuance; but, on the other hand, it may be said that the insured could be deprived of insurance already paid for, were the company permitted to conditionally fix the inception of the term of insurance at the date of the policy, dependent upon subsequent payment and delivery. This period between the dating of the policy and its delivery, under such construction, would inure to the benefit

of the company, for it is conceded that if the insured in this case had died between the issuance of the policy, September 8th, and the payment of the premium and delivery of the policy, September 24th, the company would not have been liable. Our conclusion on this point is that it was contemplated by the parties, as gathered from their conduct and the documents, not only that the policy became effective September 24th, but also that the insurance paid for by the initial premium had its inception September 24th.

"Having determined that the insurance period paid for began September 24, 1902, it follows that it would have expired March 24, 1903, had the premium not been paid, but it was paid, and therefore the policy remained in force until forfeiture by non-payment of the next semi-annual installment. The insurance period covered by the first and second premiums expired September 24, 1903, and, the insured having died September 11th, the policy was in force, unless forfeited by a failure to make the payment due September 8th. Whether it was forfeited depends upon the meaning of the language chosen to express the forfeiture, which reads: 'If any premium be not paid when due, this policy shall be void until duly reinstated during the lifetime and good health of the insured.' In our judgment, this language was used with

reference to the continuation of the policy after the period already paid for. Forfeitures are not favored in the law, and any other conclusion would work a hardship upon the insured, and should not be upheld unless required by the terms of the contract. It was proper for the insurer to provide that the premium should be paid in advance of the commencement of the period of insurance covered by such payment. As stated in New York Life Ins. Co. v. Statham, 92 U. S. 24, 23 L. Ed. 789, contracts of this character are not contracts of assurance for a single year, with the privilege of renewal from year to year by paying the annual premium; but they constitute entire contracts of assurance for life, subject to discontinuance or forfeiture for non-payment of any of the stipulated premiums. This theory is reiterated in McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. Looking at the contract, therefore, as being one of insurance for life, the most reasonable view is that failure to pay a premium due on a certain date was intended to strike at the contract for the future, and not that part of the contract already executed. This point, we think, is covered by the reasoning in McMaster v. New York Life Ins. Co., supra, where application was made and payment fixed on December 12th, and the policy was issued and

dated the 18th, and delivered the 26th, of December. The insured died 13 months after the date of the policy, or the last day of grace; and one of the questions before the court was whether the period of insurance had its inception at the time fixed for payment, December 12th, or at the date of the policy, December 18th. In this respect the court said: 'Notwithstanding the premiums in this instance were not actually paid and received, and the policies delivered, until December 26th, it may be conceded that, and in accordance with the practice of such matters, the contracts of insurance commenced to run from December 18th, rather than from December 26th. They were certainly not in force December 12th.' It will be observed that the court conceded the insured period ran from the date of the policy, rather than from the date of its delivery; but whether it did, or not, was not decided, because the question before the court was whether or not the policy was forfeited upon failure to make the payment on December 12. 'We are dealing purely with questions of forfeiture, and the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract.' And in discussing the effect of the forfeiture

clause, it was stated: 'To hold the insurance forfeitable for non-payment of another premium within the year for which payment had already been fully made would be to contradict the legal effect, under the applications and policies, of the first annual payment. Clearly, such a construction is uncalled for., if the words 'the 12th day of December in every year thereafter' could be assumed to mean in every year after the year for which the premium had been paid.' The court concludes: 'In our opinion, the payment of the first year' premiums made the policies nonforfeitable for a period of thirteen months, and, inasmuch as the death of Mr. McMaster took place within that period, the alleged forfeiture furnished no defense to the action.' "

To the same effect is the case of Stinchcombe v. New York Life Ins. Co., 80 Pac. 213, decided by the Supreme Court of Oregon, as follows:

"The defendant either insured Stinchcombe from the 5th day of May, or it did not insure him until the 24th day of July, when the policy was delivered and the premium paid and accepted by it. It is certain that it did not make itself liable until the latter date, and are we to suppose that, without engagement to that effect, the company intended to collect the premium and the insured to pay for insurance he did not have? Rather

would the deduction be to the contrary. And such is our interpretation of the contract, that it did not become effective and binding as an insurance upon the life of Stinchcombe until such latter date, either to fix the liability of the company or to require the insured to pay for insurance in the meanwhile. Now, the $70.40 paid for two years' insurance. It is so expressly stated in the policy as follows: 'Being the premium for two years' term insurance.' This insurance began with the date of July 24, 1894, by the delivery of the policy and the payment and acceptance of the premium, and Stinchcombe's life became insured, not alone for the term of two years, but for the entire term fixed by the policy according to its provisions, but subject to forfeiture for the failure to perform those conditions subsequent as might entail such a result, among which are those relating to the prompt payment of the premiums. New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789. By one of the conditions on the next page, so denominated, a grace of one month is allowed in the payment of the annual premiums, subject to an interest charge, so that on the face of the contract there was accorded the insured 25 months in which to make the second payment of premium, thus extending the time to June 5, 1896. Such premium not having been paid before that

date, a forfeiture was incurred, but when did it become operative? At once upon the default in meeting the payment, or at the end of the time for which the insured had paid for his insurance? It is argued that the forfeiture clause is direct and unmistakable, and indicates an intendment that the policy should become at once void by reason of the non-payment of the premium on the day it was demandable. It does not say so, however, but that it 'shall become void.' The interpretation would deprive the assured of a period of the insurance that he had actually paid for, to-wit, from June 5th to July 24th, so that the forfeiture, in that view, would not only incur the penalty of depriving the assured of his right to continue under the contract, but also of cutting short by a most appreciable term the insurance absolutely obtained by payment of the premium for two years in advance. There is here a palpable incongruity, and, if the company's contention be the correct one as to the proper interpretation of the contract, it is perfectly manifest that it will be fraught with injustice to the beneficiary. It is very well understood, a condition arising from an innate sense of justice, that the law in its policy and spirit is averse to the declaration of forfeitures, and will not entail such consequences as between individuals, but in pursuance of the plain

and obvious intendment of contractural relations. It is also a canon of the construction of contracts, so well settled as to need no citation of authorities to support it, that inconsistent provisions rendering it doubtful or uncertain whether, or under what conditions, a forfeiture was really intended, will be so interpreted, whenever they can, within the bounds of reason and common fairness, as to elude the forfeiture and secure to the parties that to which they are in justice entitled. Beyond this there is another rule that, as between inconsistent, conflicting and incongruous provisions, of doubtful and ambiguous significance, in a policy of insurance, it being manifest that the form and all the necessary conditions are the statements, essentially, of the officers, agents, and attorneys of the company, the construction most favorable to the assured will be adopted and applied. Fenton v. Fidelity & Casualty Co., 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 Pac. 822; National Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563; McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. Now, applying these plain and obvious canons of construction and interpretation, it is neither inconsistent with reason nor fair dealing to conclude that the true intendment of the contract, looking

through the whole of it, including the application, the policy, and the provisions on the next page, is that there should be no forfeiture of the insurance paid for—that is, of any part of the 'two years' term insurance'—and that the policy was not rendered void, as affecting such term or period, until its time had fully run. This does not take into account the effect of the provision touching the month of grace for making the payment, because not involved here. Such, in effect, is the holding of the Supreme Court of the United States in McMaster v. New York Life Insurance Company, supra. In reality, this is a much stronger case than that for the beneficiary. It does no injustice to the insurance company having received the stipulated consideration, and it conserves to the injured or his beneficiary that for which he has actually paid his money in the way of premium."

To the same effect is another case decided by the Supreme Court of Missouri, Halsey vs. American Central Life Insurance Co., 167 S. W. 951, in which the following language is used:

"All the courts of the country, both state and federal, give a very liberal construction to contracts of insurance, and never permit a miscarriage of justice by a technical or narrow construction thereof.

"While this record discloses the fact that

the application for the insurance of the deceased was dated May 24, 1906, and that the premiums were payable upon that date, yet that was not all of the contract between the parties. The policy itself was just as important a factor in the agreement as was application for the insurance. The policy was dated May 31, 1906; but it was not delivered until June 5th of that year, which by its express terms was not to become effective until delivered and the first annual premium paid, which was done on June 5, 1906.

"Under the terms of this contract, which consisted of the application and the policy issued in pursuance thereto, the deceased was clearly insured for one full year from June 5, 1906, to the last minute of June 4, 1907. That being unquestionably true, the tender made of the second premium by the brother of the deceased on May 31, 1907, while the policy was still in full force and effect, was clearly made within the time agreed to by the parties, if the entire contract is to be considered as a whole.

"If this is not true, then, by parity of reasoning advanced by counsel for appellant, the policy was never in force, for the simple reason that the first premium was not paid on May 24, 1906, but was paid on the 5th of June, 1906, the date the policy, by its terms, went into effect. This very act of the parties,

under the facts and circumstances in the case, puts a practical construction upon the contract made and entered into between them, namely: That each succeeding annual premium should be paid during the life of the policy, and thereby keep it in full force and effect for the period of time stated therein.

"If this is not the true meaning of the parties, then the appellant is driven to the conclusion that the deceased paid for a full year's insurance; but under the terms of the policy he was only entitled to about 11 1-2 months of insurance.

"This nor any other court should allow an insurance company to thus stultify itself after taking the premium for a full year, and then escape liability by interposing the technical question that by the application for the policy the insured agreed to pay the premium long before it was due.

"That contention of counsel for appellant is not in harmony with the rulings of the best considered cases disposed of by the courts of last resort in this country and in England.

"These views are so thoroughly in harmony with the rulings of the various courts of America it would be a useless waste of time and space to cite them, which, however, will be cited by the reporter in the publication of this opinion."

The case of Cilek vs. New York Life Ins. Co., 149 N. W. 49, is a case more clearly in point than any of the foregoing mentioned, or any case that we have been able to find. The opinion does not give the provision of the policy in reference to the due-date of the premiums, but the application and policy provided, as in this case, that it should not take effect or be in force until the policy was delivered and the premium paid. The court held that the policy did take effect from that date and the insured must get a full year's insurance for a full year's premium. We quote from it as follows:

> "The application which the assured signed June 13th contained a clause that the company would incur no liability under the application until it had been received and approved by the company at the home office and the premium had actually been paid to and accepted by the company or its authorized agent during the lifetime and good health of the applicant. The application was not received and approved by the company at its home office until June 23d, and, in the absence of proof as to when the premium was paid, we must assume that it was not paid until the policy was delivered, some days later. The contract of insurance was, therefore, never a contract binding upon both parties prior to, at the earliest, June 23d. The policy contains this stipulation on the part of the company:

" 'A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of 5 per cent. per annum.'

"If the contract of insurance did not become binding until June 23d, the death of the assured on July 23d was within the month of grace allowed, and the policy had not lapsed. This very question was before the Supreme Court of the United States in the case of McMaster against this same defendant, and the company was held liable by a united court, in a very clear opinion by Mr. Chief Justice Fuller, which is reported in McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64."

The court then reviews the McMaster and Stram-Back cases above cited, and concludes as follows:

"Little could be added to what has been said by these two eminent courts in their opinions above cited. Their reasoning meets our entire approval. We therefore hold that the contract of insurance in the case at bar did not go into effect until June 23, 1899; that the payment of premium for each succeeding year down to and including the payment in June, 1905, extended the life of the policy for an additional year from June 23d;

and that with the one month's grace added to June 23, 1906, the policy had not lapsed, but was in full force and effect at the time of Mr. Rye's death."

It is true that, in the Methvin case, the policy was delivered a few days after the policy was dated, which date cut short the actual time that the policy was carried for the first quarter, but there is nothing in the provisions of the application or policy that could change the clear language of the policy as to the due-dates of the premiums. The courts clearly constrain to hold that it could not vary the written terms of the contract. But, if the policy in that case, as in this, had provided that the first premium was to be paid on the delivery of the policy, and thereafter, quarter-annually, the court would doubtless have enforced the contract as it read.

THE CASES RELIED UPON BY PLAINTIFF IN ERROR HAVE NO BEARING UPON THE CASE AT BAR.

There is not a single case cited by counsel for plaintiff in error that has the slightest bearing on this case. We will put in parallel columns the provisions in reference to payment of premiums of a few of them, with that contained in the policy in this case, so that the court can see at a glance that they have no application whatsoever.

In McConnell v. Ins. Co., 92 Fed. 769, the provision is:	The provision in the policy in the case at bar is:

"The annual premium on this policy may be paid by quarterly installments, as hereinafter stated, on or before the 27th day of April, July, October and January in each year."

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company."

What possible aid an opinion, construing such a provision, can give this court in construing the provision in this case, is beyond us. It certainly has not the slightest application.

In Methvin v. Ins. Co., 61 Pac. 1112, the provision is:

"That the said company, in consideration of the application and the payment of a premium of $24.96 on or before the 30th day of July, October, January and April in each year, for the period of twenty years from the date hereof, does," etc.

The provision in the policy in the case at bar is:

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company."

A blind man can see, without reading the opinion in the Methvin case, that it can have no possible bearing on this case.

In Thomas v. Ins. Co., 75 Pac. 665, the policy provided:

"The premium thereon was $90.90, payable semi-annually, on the 25th day of January and July each year."

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company."

A reading of the two quotations above is all that is necessary. The Thomas case is clearly without point in reference to this case.

In Tibbetts v. Ins. Co., 65 N. E. 1033, the provision of the policy was:

"In consideration of the ..... sum of $22.52 to it in hand paid by John C. Tibbetts, and of the quarter-annual premium of $22.52 to be paid at or before twelve o'clock M., on the 25th day of April, July, October and January in each year during the continuance of this policy, does insure," etc.

The provision in the policy in the case at bar is:

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the Company."

What possible reliance plaintiff in error can place on the Tibbetts case cannot be found in its dis-

cussion of it, nor in the similarity of the provisions contained in the policy.

In Jewitt v. Ins. Co., 112 N. W 734, the provision was:

"On or before the 11th day of August, November, February and May in each year, until ten full annual payments have been paid, or until the prior death of the insured."

The provision in the policy in the case at bar is:

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the Company."

A glance at the two provisions is all that is necessary to show that there is no parallel in the two cases.

In Tigg vs. Ins. Co., 133 N. W. 322, the policy provided:

"In consideration of the application———, and of the sum of $38.98, to it in hand paid, and of the annual premium of $38.98 to be paid at the office of the company in the City of Davenport, Iowa, at or before twelve o'clock

The provision in the policy in the case at bar is:

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the Company."

M., on the 7th day of August in each year, during the life of the insured," etc.

Is there any analogy between the provisions in the two cases?

We will not burden the court by quoting the provisions in other cases cited. All the other cases are less in point, if possible, than the foregoing ones.

In each of the foregoing cases the company did succeed in beating the insured out of a few days of insurance actually paid for, because the delivery of the policy was a few days subsequent to the due-dates of the premiums, as strictly provided by the policy. The courts felt compelled to do this because of the clear, unequivocal wording of the contract. But in this case the matter is reversed. This court, *in order to deprive* the defendant in error of a single day of insurance actually paid for, would be compelled to violate the clear meaning of the language of the contract. In those cases cited by plaintiff in error, the applications did not provide, as in this, that "said policy shall not go into effect until the same shall be issued and delivered by the said company and the first premium thereon paid in full," etc., followed by a provision in the policy, "Premium—Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company."

THE ALTERNATIVE PROVISIONS IN

MAKING THE PAYMENT OF PREMIUMS, DOES NOT MILITATE AGAINST THE VIEW WE HAVE HERETOFORE MAINTAINED.

We have discussed the case on the theory, that the controlling provision of the policy in reference to the due dates of the second and other quarterly premiums, is dominated and clearly controlled by the provision of the policy, so frequently heretofore quoted.

Defendant in error insists that the alternative provision dominates. This is the whole paragraph:

> PREMIUMS—"Twelve and 70/100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home Office of the Company, *or* as provided under the heading 'Provisions' on the second page hereof, in exchange for the Company's receipt on or before the nineteenth day of February, May, August and November in every year during the continuance of this Policy, until ten full years' premiums shall have been paid, or until the prior death of the insured."

That part of the "Provisions on the second page" referred to in the foregoing paragraph, that relates to the due date of the premiums, is as follows:

> "Premiums are payable at the Home office of the Company, but may be paid to an agent of the Company on or before the dates

when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company."

The first clause provides that "first premium of $12.70 must be paid on the delivery of the policy and thereafter, quarter-annually, at the Home Office of the Company, or (alternatively) they might be paid on the dates specified under the provisions of page 2. Now, this clause reiterates that all premiums are payable at the home office of the company, but further provides that they may be paid on or before the dates mentioned, to an agent of the company, having the specified official receipt, and the negative of the proposition follows that he could not pay to the agent unless he had the official receipt. In other words, giving full meaning to all the words of the different provisions, they simply provide that the second quarterly premium was to be paid one-quarter of a year after the delivery of the policy at the home office of the company, but might be paid if the insured desired to an agent, having the official receipt, on or before the dates specified.

The most that could possibly be claimed by the plaintiff in error is, that under the provision, the second quarterly premium must be paid one-quarter of a year after the delivery of the policy—*or* (an option) on the 19th day of May, August, November and February. But, this would not help plaintiff in error.

The utmost claim that plaintiff in error could make is, that the clauses make it ambiguous as to the due dates of the premiums. But, this would be of no avail to the company. All the rules of the construction of a policy of insurance, where the insurance company is trying to maintain a forfeiture, are against it.

In the case of *McMaster vs. Ins. Co.* 44 Law Ed. 73, the court says:

> "We are dealing purely with the question of forfeiture, and the rule is, that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract.
>
> *Thompson vs. Phenix Ins. Co.*, 136 U. S. 287, 34 L. Ed. 308, 10 Sup. Ct. Rep. 1019; *First Natt. Bank vs. Hartford F. Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563."

In the case of *Royal Ins. Co. vs. Martin*, 48 L. Ed. 389, the court uses this language:

> "As the words of the policy are those of the company, they should be taken most strongly against it, and the interpretation should be adopted which is most favorable to the insured, if such interpretation be not inconsistent with the words used."

To the same effect is *Liverpool Ins. Co. vs. Car-*

ney, 45 L. Ed. 462, where the court uses the following language:

> "To the general rule there is an apparent exception in the case of contracts of insurance; namely, that where a policy of insurance is so framed as to leave room for two constructions the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys ,officers, or agents prepared the policy, and it is its language that must be interpreted."

Cooley, in Briefs on Insurance, Volume 1, page 632, clearly states the rule in this language:

> "It is now the well-settled rule that contracts of insurance will not be subjected to any critical or technical interpretation, but will be liberally construed in favor of the insured, whenever there is an ambiguity in the language used."

Again on page 633 of the same volume, the same author, citing authorities, uses this language:

> "In view of the rule that the policy should be liberally construed in favor of the insured, it follows that provisions of the contract limiting or avoiding liability will be construed strictly against the insurer."

Again, on page 636, he uses this language:

"Contracts of insurance, whether of life or fire insurance, will, therefore, be construed so as to avoid a forfeiture, if possible.

In accord with these principles, it is recognized as the settled doctrine that a policy of insurance must be liberally construed in favor of the insured, so as not to defeat without necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure; and, when the words are without evidence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted."

THE ATTEMPT OF THE INSURANCE COMPANY T OSHOW THAT ITS AGENT ATTEMPTED TO OR COULD CHANGE THE TERMS OF THE POLICY, IS UNAVAILABLE.

The plaintiff in error introduced evidence, over the objection of the defendant in error, to the effect that the agent of the company, when the policy was delivered, undertook to and did convince the insured that the premiums were payable on the 19th day of February, May, August and November. In other words, the agent claimed that he misrepresented to the insured the clear meaning of the contract. The defendant in error then offered in evidence in rebuttal, statements made by the insured, subsequent to the delivery of the policy to his wife, that his premium would be payable on the 15th day of July, and that he had a month's grace thereafter, in which

to pay; that in fact, on the morning of the day he was drowned, while writing some letters, he told his wife that his premium was due, and that he ought to send a check, but that he had until the 15th day of August in which to do it, and that he would do it that day or shortly after. The testimony of the agent of the company was clearly inadmissible, but if it was admitted, we think, the court erred in not admitting the testimony we offered. But, that such testimony is of no avail to the insurance company, we think, is settled by an overwhelming weight of authorities.

In the first place, the policy specifically provides, "that no condition or provision of this policy can be waived or modified in any case, except by an endorsement signed by the president, one of the vice-presidents, secretary or assistant secretary, etc.; that no agent has power, in behalf of the company, to make or modify this or any other contract of insurance." In fact, the agent did not claim to have any such power. So, the evidence was clearly inadmissible. In fact, we think a court would be very loathe, even though the agent had the power, to consider such testimony favorably. Two parties were present in the room, the insured, who is dead, and the agent of the company who is testifying on its behalf. Such a rule would permit the grossest of fraud in favor of the company.

In fact, we do not think it would be competent for the company itself to show that a contract which had been prepared by its own officers or by itself,

could be changed or modified by testimony, statements made, etc., at the time of the delivery of the contract and contemporaneously with it.

We do not think it necessary to cite any authorities to support our contention, that this testimony was entirely inadmissible. It should be rejected, as the court below rejected when it granted our motion for a directed verdict.

We will cite but one authority, and it is the case of the *Northern Insurance Co. vs. Grand View Building Association*, 46 Law Ed. 213. This case reviews at great length this question. We quote only a portion thereof on pages 234 and 235 as follows:

> "What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing ,if in ambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it

is reasonable and competent for the parties to agree that such knowledge and consent shall be manifest in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation."

We believe that no error was committed by the lower court, and that the judgment should be affirmed.

S. WARBURTON and
BOYLE, BROCKWAY & BOYLE
Attorneys for Defendant in Error.